No. 86-1857

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONTINENTAL BANK INTERNATIONAL,

Appellant,

—against—

CITY OF NEW YORK,
DEPARTMENT OF FINANCE,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS FOR THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

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July 22, 1987

Statement Pursuant to Rule 28.1

As noted in the Jurisdictional Statement (p. ii), appellant has moved for an order permitting it to file its Rule 28.1 listing under seal. Copies of the listing have heretofore been submitted to the Court for its *in camera* review.

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APPELLANT'S REPLY BRIEF

Appellee does not deny, and the State of New York as *amicus curiae* forthrightly confirms, that this appeal raises federal questions of substantial public importance regarding the power of states and localities to tax all Edge Banks that operate branches or otherwise conduct business across state lines. Their sole contention is that these questions were correctly decided by the Court below. That contention, we submit, is without merit.

I.

Section 627 of the Edge Act Permits Taxation by the Home-Office State Only.

A.

Appellee and *amicus curiae* view Section 627 as a grotesque circumlocution: According to appellee, the statutory mandate that an Edge Bank "shall be subject to tax by the State within which its home office is located" means

"merely" that an Edge Bank can be taxed at "the place within the continental United States where an Edge [Bank] in 1919 could locate and, therefore, be subject to the state's taxing jurisdiction" (Motion 15).[1] Making the same contention, *amicus curiae* claims that the "home office" state "merely" means "the only state which Congress believed would have a taxable nexus with an Edge [Bank]" (*Amicus* 9).

Not only does this contention do violence to the statutory language, but it is wholly dependent on a single, demonstrably incorrect premise: that Congress intended to isolate each Edge Bank within a single state, forever disabled from either maintaining an office or conducting any business whatever across a state line.

Appellee itself undercuts that premise by acknowledging that Edge Banks have been authorized from the outset to operate domestic agencies (Motion 16). Such agencies would clearly have provided sufficient "nexus" to permit multistate taxation if Congress had deemed multistate taxation to be in the national interest. *See* the authorities cited in J.S. 15 n.11. By enacting Section 627, Congress expressed its view that the national interest would best be served by permitting an Edge Bank to be taxed only by its home-office state.

Section 627 on its face refutes the premise that Congress expected every Edge Bank to have only one office and to do business in only one state. The very reference to the "home" office shows that Congress contemplated that an Edge Bank might have multiple offices, and its reference

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[1] This and similar citations are to Appellee's Motion To Dismiss or Affirm. Citations to Appellant's Jurisdictional Statement and to the State of New York's *amicus curiae* brief are abbreviated "J.S." and "*Amicus*" respectively.

to the home-office "State" reflects Congress' understanding that such offices might be located in more than one state.

This conclusion is confirmed by the references to the "home office" elsewhere in the Edge Act. Section 613, for example, distinguishes between "the place in the United States where [an Edge Bank's] home office is to be located" and "the place or places where its operations are to be carried on." Like the Court below, appellee and *amicus curiae* ignore that crucial distinction.

As shown in the Jurisdictional Statement (J.S. 5, 14), the Edge Act's legislative history demonstrates that Congress expected—and indeed wanted—Edge Banks to operate across state lines. Like the Court below, appellee and *amicus curiae* ignore these expressions of congressional intent.

Undoubtedly responding to the wish of Congress, the FRB has always permitted Edge Banks to engage in interstate operations, at first through agencies and later through branches. In doing so, the Board recognized that Edge Banks "are not subject to federal law that limits the power of banks to establish branches across state lines." 65 Fed. Res. Bull. 546 (July 1979).

Appellee and *amicus curiae* assert that the FRB is simply wrong: "Congress," appellee insists, "intended to prohibit domestic branches" (Motion 16n.). Like the Court below [A2, A5],[2] appellee and *amicus curiae* claim that Section

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[2] Mysteriously, appellee says that "the Court below did not hold that branch offices were unlawful" (Motion 2). That statement is incorrect, for such a holding was the indispensable predicate for the Court's conclusion that Section 627 was not intended to prohibit taxation by a state in which an Edge Bank has a branch but not its home office [A2, A5]. *Amicus curiae* candidly acknowledges the conflict between its interpretation of Section 615(b)—which echoes that of the Court below—and the FRB's authorization of domestic branching (*Amicus* 11 n.7).

615(b)—which authorizes branches or agencies abroad with FRB permission—prohibits branches in the United States by some sort of negative implication (Motion 16; *Amicus* 9-10). If that were so, however, Section 615(b) would necessarily prohibit domestic agencies too, since it refers to "branches or agencies" without making any distinction between them. But the FRB has never construed Section 615(b) as a bar either to domestic agencies, which it has authorized since 1920, or to domestic branches, which it has authorized since 1979. The position of appellee and *amicus curiae*, therefore, is that for sixty-seven years the FRB has been consistently misinterpreting a statutory provision that the FRB itself drafted and that it is responsible for administering.[3]

The FRB's long-standing administrative interpretation, in which Congress has acquiesced, faithfully reflects the origi-

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[3] Appellee and *amicus curiae* incorrectly assert that in 1920 the FRB interpreted Section 615(b) as prohibiting domestic branches (Motion 8-9; *Amicus* 9-10). As noted above, Section 615(b) cannot be read as prohibiting branches but not agencies, yet the FRB has allowed agencies since March 1920. Clearly, therefore, the FRB prohibited domestic branches, not because of any statutory mandate, but in the exercise of its general regulatory powers. In promulgating the original Regulation K, the Board expressed its understanding that it has broad discretion to regulate Edge Banks:

> "Congress . . . has placed upon the [FRB] the responsibility of making such regulations and restrictions as may be necessary to insure the conservative and prudent management of [Edge Banks] and to safeguard as far as possible the interests of the public with whom they may do business. . . .
>
> ". . . The [FRB] . . . reserves the right from time to time to amend its regulations in such manner as experience and changing conditions may dictate." (6 Fed. Res. Bull. 379 (April 1920)).

In 1979, when it authorized domestic branches for the first time (Reg. K, § 211.4(c), June 14, 1979), the FRB acted without new express statutory authorization, obviously in the belief that such authorization was conferred by the original legislation.

nal congressional intent. When Congress enacted Section 627 it was well aware that the FRB was empowered to authorize Edge Banks to establish offices, and generally to do business, across state lines. Therefore, when Congress authorized taxation by the home-office state, it was unambiguously identifying the one specific jurisdiction, out of a number of potential jurisdictions, in which an Edge Bank would be subject to taxation. No other conclusion is consistent with the statutory language, the legislative history and the FRB's administrative interpretation.

B.

If Section 627 does not mean that the home-office state has the exclusive power of taxation, it has no apparent meaning whatever. It is unlikely, to say the least, that Congress would expressly empower the home-office states to tax Edge Banks if it intended that they be taxed by every state in which they do business. The Court below passed by this difficulty in discrete silence.

Appellee and *amicus curiae* struggle to attribute some cognizable meaning to Section 627 by suggesting that it "was intended only to prevent discriminatory taxation" (Motion 12; *Amicus* 9). They fail to explain, however, why Congress would prohibit tax discrimination only by the home-office state while permitting all other states to subject an Edge Bank to even the most grossly discriminatory taxation.

C.

Appellee and *amicus curiae* argue that "Section 627 contains no words of prohibition" (Motion 14; *Amicus* 8) and that authorizing the home-office state to tax "does not imply prohibition of taxation by other states" (Motion 21).

These contentions run afoul of the fact that this Court has repeatedly construed similar statutes as prohibiting all taxation that they did not expressly authorize. *E.g., Owensboro Nat'l Bank* v. *Owensboro,* 173 U.S. 664 (1899); *Bank of California* v. *Richardson,* 248 U.S. 476 (1919); *First Agricultural Nat'l Bank* v. *State Tax Comm'n,* 392 U.S. 339 (1968) (discussed in J.S. 10-12). All of the considerations that this Court found pertinent in those cases are present here, and dictate a similar result.

D.

Appellee's discussion of the legislative history is devoted wholly to irrelevancies.

First, the Senate debate, to which appellee devotes most of its attention (Motion 17-19), concerned taxation proposals materially different from what eventually became law. At the time of the Senate debate, the language now appearing in Section 627 had not yet been drafted. Since the Senate ultimately acquiesced in the House's view as to how Edge Banks should be taxed, the various impromptu comments on the Senate floor shed no light on the meaning of Section 627.[4]

Second, appellee makes brief reference to two taxation proposals considered and rejected by the House (Motion 19-20). Since the reasons for rejecting the two proposals are obscure, no conclusions can fairly be drawn from the bare fact that these proposals were rejected.

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[4] Not even the Senate, however, intended Edge Banks to be subject to general state taxation, for the bill it originally passed provided that they be taxed "the same as member banks of the Federal reserve system." 58 Cong. Rec. 5075 (1919). The national banks, to which this provision presumably referred, were then taxable only on their real estate. R.S. § 5219; *Bank of California* v. *Richardson, supra.*

Third, Representative Phelan's statement that Congress intended to prevent discriminatory taxation (Motion 20-21) proves nothing, for no one doubts that Section 627 prohibits tax discrimination by the home-office state. The question in dispute is whether the home-office state's power to tax an Edge Bank is exclusive. Representative Phelan did not address that question.

Appellee conspicuously ignores the extensive evidence, cited in the Jurisdictional Statement (J.S. 15-16), that the authors of Section 627 deliberately patterned that provision on the equivalent section of the National Bank Act (R.S. § 5219) and that they did so with specific advertence to this Court's decisions construing that earlier statute. The members of the House Banking and Currency Committee who drafted Section 627 were surely aware that only a few months earlier this Court had held Section 5219 to be "the exclusive rule governing state taxation" of national banks. *Bank of California* v. *Richardson, supra*, 248 U.S. at 483. Regardless of any differences of detail between Section 627 and R.S. § 5219, the inescapable conclusion is that the authors of Section 627 intended the two statutes to be given a similar construction: Both were to establish the "exclusive rule governing state taxation."

Appellee and *amicus curiae* understandably decline to defend the Court of Appeals' erroneous statement that the Congress that enacted Section 627 had "a mistaken notion that national banks were subject to State tax" [A6]. It was on that basis alone that the Court purported to justify its disregard of the most relevant portions of the legislative history.

E.

Appellee and *amicus curiae* both rely on a *dictum* of an intermediate appellate court in Texas in *City of Houston*

v. *Morgan Guaranty Int'l Bank,* 666 S.W.2d 524 (Texas Ct. App., 1st Dist. 1983), *cert. denied,* 469 U.S. 1213 (1985). The sole issue in that case, however, was whether, under the *second* sentence of Section 627, the *shares* of an Edge Bank are subject to taxation outside its home-office state. The Court specifically noted that "we are not concerned with a tax levied upon [the Edge Bank] as a corporation." *Id.* at 529. Because the second sentence of Section 627 permits an Edge Bank's *shares* to be taxed without reference to the home-office state, the issue in *Morgan Guaranty* was in no way similar to the issue in this case, and the Court's holding in no way supports the arguments advanced here by appellee and *amicus curiae.*

II.

Without Congressional Consent, State Taxation of Edge Banks Is Constitutionally Impermissible.

Appellee and *amicus curiae* make no attempt to explain why, if the Constitution permits the states to tax Edge Banks without the consent of Congress, Congress found it necessary to enact a statute permitting taxation by the home-office state. There is only one logical answer: Congress understood that under the long-established constitutional principle applicable to federally chartered banks, Edge Banks would not be subject to any state taxation whatever unless Congress gave its express consent. Indeed, this principle was specifically referred to during the debates on the Edge Bill. 58 Cong. Rec. 4955 (1919) (remarks of Senator Cummins).

Appellee and *amicus curiae* are unable to point to even one case in which this Court has ever held that a federally chartered bank can be taxed by the states without the

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express permission of Congress. Confronted with a long and unbroken line of contrary authority (J.S. 18), appellee can say only that all of these cases are somehow "obsolete" (Motion 23). Not only do appellee and *amicus curiae* fail to cite a single case—and we know of none—in which this Court has advanced such a suggestion, but they ignore the modern cases in which the Court has referred to the historic doctrine with unequivocal approval. *E.g., First Agricultural Nat'l Bank* v. *State Tax Comm'n, supra,* 392 U.S. at 340; *Department of Employment* v. *United States,* 385 U.S. 355, 360 (1966).

Failing to identify any constitutionally significant difference between Edge Banks and national banks, appellee and *amicus curiae* fall back on the startling assertion that Edge Banks are not "banks" at all, notwithstanding the fact that they have all the attributes of banks, including the power to receive deposits and to make commercial loans. *See* 12 U.S.C. § 615(a).

Appellee and *amicus curiae* purport to find significance in the fact that in statutory and regulatory parlance Edge Banks are sometimes referred to as "corporations" (Motion 31; *Amicus* 4 n.2). By similar reasoning one might argue that national banks are not "banks" either, because certain sections of the National Bank Act refer to them as "associations," including the section that long governed the power of state and local governments to tax national banks (R.S. § 5219 [F8]).

Appellee and *amicus curiae* do not even try to explain how, if an Edge Bank is not a "bank," it is nonetheless claimed to be subject to taxation under a statute that by its terms is applicable only to a "banking corporation," defined as an entity doing a "banking business" [F8-F9].

Appellee and *amicus curiae* ignore the numerous references to the national banks in the legislative history, including the proponents' revealing statement that the Edge Act was intended to be "a new national banking act for banks specializing in foreign trade." 58 Cong. Rec. 7855 (1919). Clearly Congress viewed Edge Banks as specialized national banks, and none of the differences between the two can be regarded as having constitutional significance (see J.S. 19-20).

In sum, there is no principled way that Edge Banks can be denied the benefit of the constitutional rule that this Court has long held applicable to every other type of federally chartered bank.

Conclusion

Appellee's motion should be denied. The decision below is in error, and this appeal presents federal questions that are both substantial and of public importance.

Respectfully submitted,

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